WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4666

IN THE MATTER OF: Served September 22, 1995

Application of DOUBLE DECKER BUS TOURS W.D.C., INC., Trading as DOUBLE DECKER BUS WASHINGTON, D.C., for a Certificate of Authority -- Irregular Route Operations) Case No. AP-95-21

On August 9, 1995, the Commission issued Order No. 4642, conditionally granting the application of Double Decker Bus Tours W.D.C., Inc., for a certificate of authority and approving common control of Double Decker and New York Apple Tours, Inc. On August 31, 1995, protestant, Old Town Trolley Tours of Washington, Inc., WMATC Carrier No. 124, filed an application for reconsideration of Order No. 4642 and a motion to stay its execution in the alternative. On September 6, we issued Order No. 4658, staying Order No. 4642 pending a decision on protestant's application. Double Decker filed a reply to protestant's application on September 8, 1995. The reply was accompanied by an application for reconsideration of Order No. 4658.

On September 20, 1995, protestant filed a motion under Rule 15 for leave to file what amounts to a surreply to Double Decker's reply to protestant's application for reconsideration. As protestant acknowledges, there is no provision in the Commission's Rules of Practice and Procedure pursuant to which protestant may file a surreply as a matter of right. Rule No. 27, which governs applications for reconsideration, contemplates the filing of an application and response thereto. Given the thirty-day statutory deadline for ruling on applications for reconsideration, the Commission believes the line should be drawn where Rule No. 27 draws it.[1]

By this order, we grant protestant's application for reconsideration but lift the stay previously placed against applicant.

PROTESTANT'S APPLICATION FOR RECONSIDERATION

A party to a proceeding affected by a final order or decision of the Commission may file within 30 days of its publication a written application requesting Commission reconsideration of the matter involved, and stating specifically the errors claimed as grounds for the reconsideration.[2] If the application is granted, the Commission

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[1] In re Webb Tours, Inc., No. AP-82-11, Order No. 2423 (May 27, 1983), aff'd per curiam, 735 F.2d 599 (D.C. Cir. 1984).

[2] Compact, tit. II, art. XIII, § 4(a).

shall rescind, modify, or affirm its order or decision with or without a hearing, after giving notice to all parties.[3] The application will be denied to the extent it relies on arguments previously considered.[4]

The only new argument presented in protestant's application relates to the Commission's findings that Double Decker is fit as to regulatory compliance and that common control of Double Decker and New York Apple is consistent with the public interest. In support of its challenge to those findings, protestant points to a notice of hearing issued August 11, 1995, by the New York City Department of Consumer Affairs (DCA), the agency which licenses New York Apple.[5] The notice charges New York Apple with several recent violations, including operating vehicles without DCA plates, switching DCA plates from licensed to unlicensed vehicles, and breaching a 1994 DCA Consent Judgment/Order (CJO), in which New York Apple acknowledges being found guilty of operating unlicensed vehicles, being ordered to cease and desist, and then operating unlicensed vehicles thereafter and in which New York Apple consents to automatic revocation of its DCA license if it engages in unlicensed activity prior to October 15, 1995. The range of sanctions contemplated by the notice includes revocation of New York Apple's DCA license and a declaration that Harry Grant and Hayim Grant are unfit to hold a DCA license or participate as a principal in any entity licensed by DCA. Protestant also relies on a DCA order issued August 14, 1995, finding New York Apple in violation of a DCA ordinance during July and August, 1995, and authorizing seizure of New York Apple's DCA plates.

Under Commission precedent the compliance fitness of a commonly-controlled carrier is relevant to a determination of an applicant's compliance fitness, and post-order events suggesting a lack of compliance fitness are proper grounds for reconsideration.[6] During the course of issuing Order No. 4642, we specifically examined the compliance fitness of New York Apple. We noted that New York Apple had been cited for operating unlicensed vehicles in 1994 and expressed our concern that given the commonality of ownership and control, applicant might exhibit some of the same behavior. On the other hand, we acknowledged the presence of extenuating circumstances and recognized New York Apple's considerable monetary expenditure in bringing its buses up to DCA standards. Weighing these factors we found applicant fit.

We were unaware of the existence of the 1994 CJO when we issued Order No. 4642. The CJO offers a complete chronicle of New York

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[3] Compact, tit. II, art. XIII, § 4(d).

[4] In re Authority to Perform Contract Operations, No. 234, Order No. 1190 (Jan. 7, 1972).

[5] The Commission takes official notice of DCA's action under Commission Rule No. 22-07.

[6] See In re D.C. Ducks, Inc., No. AP-94-21, Order No. 4361 (Aug. 9, 1994) (in finding applicant fit Commission considered challenges against fitness of carrier allegedly under common control with applicant); In re Ruchman & Assocs., Inc., t/a RAI, Inc., No. AP-91-32, Order No. 3868 (Dec. 19, 1991).

Apple's violations in 1994, which had not been confirmed in this record as of the issuance of Order No. 4642. When the Commission is presented with a record of violations, it applies a five-part test to assess the likelihood of future compliance.[7] That test was not applied in Order No. 4642. Now that we have a clear record of New York Apple's violations in 1994, we shall use the five-part test as a derivative measure of Double Decker's fitness and a gauge of whether common control is in the public interest. In conjunction therewith, it is important that we consider any violations found to have occurred in 1995. Therefore, we will grant reconsideration but, except to the extent provided below, defer our determination of whether to rescind, modify or affirm Order No. 4642 until the proceedings before DCA are concluded. As directed below, Double Decker shall file a written report with the Commission on the first of each month, apprising the Commission of the status of the DCA proceedings. The report shall include copies of all relevant orders, agreements and stipulations.

We have considered Double Decker's argument that it has a bona fide defense to the DCA charges. We believe that issue is best left for resolution by DCA.[8]

We also have considered Double Decker's argument that under In re Regency Limo. Serv., Inc., No. AP-94-18, Order No. 4323 (June 21, 1994), and In re Miju Express, Inc., No. AP-91-36, Order No. 3865 (Dec. 19, 1991), a finding by DCA that New York Apple is guilty as charged would not preclude affirmance of Order No. 4642. While affirmance is a possibility, it is not a foregone conclusion. Other Commission precedent would support rescission. See In re Madison Limo. Serv., Inc., No. AP-91-39, Order No. 3891 (Feb. 24, 1992) (application for certificate denied where applicant conducted post-revocation operations), aff'd on reconsideration, Order No. 3914 (Mar. 25, 1992); In re Webb Tours, Inc., No. AP-82-11, Order No. 2404 (Mar. 30, 1983) (application for expanded authority denied where applicant's past operations exceeded scope of existing certificate), aff'd on reconsideration, Order No. 2423 (May 27, 1983), aff'd per curiam, 735 F.2d 599 (D.C. Cir. 1984); In re Holiday Tours, Inc., No. 11, Order No. 206 (Oct. 11, 1962) (on reconsideration)

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[7] The five factors are: (1) the nature and extent of the violations, (2) any mitigating circumstances, (3) whether the violations were flagrant and persistent, (4) whether applicant has made sincere efforts to correct its past mistakes, and (5) whether applicant has demonstrated a willingness and ability to comport with the Compact and rules and regulations thereunder in the future. In re Madison Limo. Serv., Inc., No. AP-91-39, Order No. 3891 (Feb. 24, 1992). "Statements of good intentions in the future do not, however, qualify as efforts to rectify past violations, and, in general, they are of limited value in assessing what the applicant's future conduct will be." DOT v. ICC, 733 F.2d 105, 112 (D.C. Cir. 1984). "Nor does it take commendable candor to admit to unauthorized operations that have already led to civil forfeitures and are a matter of public record." Id. at 112.

[8] We note, however, that the asserted defense -- that New York Apple switched bus numbers not plates -- does not explain the four occasions a New York Apple bus was observed operating without any DCA plate.

(application for certificate denied where controlling shareholder was convicted embezzler and application was supported by inconsistent and evasive statements). Relevant Interstate Commerce Commission precedent would support a modification of Order No. 4642. See Wilkett v. ICC, 710 F.2d 861 (D.C. Cir. 1983) (certificate may be issued to marginally fit carrier for limited time period, subject to review).

Finally, we have considered that Double Decker withheld the 1994 CJO until its existence had been revealed by protestant, despite ample opportunity to bring it to the attention of the Commission before Order No. 4642 was issued.

Our decision to grant reconsideration is bolstered by the view of Savy Grant, Double Decker's President and a Vice President of New York Apple, that New York Apple and Double Decker are one and the same. According to a recent civil complaint filed in New York against DCA's Commissioner and verified by Ms. Grant, DCA's seizure of New York Apple's plates caused the following damages to New York Apple (referred to as NYAT):

> A. NYAT was about to enter an agreement to take the company public, which would have generated at least $10 million in new capital to NYAT which was to be used for nationwide sightseeing bus operations. In fact, NYAT had already obtained a license to operate in Washington, D.C. as "Doubledecker Bus Tours, WDC, Inc." This cannot now occur.
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> H. A license to operate tour buses in Washington, D.C., which took three years to obtain, is now in jeopardy because NYAT cannot get insurance or get its buses inspected in Washington, D.C.

Exhibit F to Double Decker's Reply to Protestant's Application for Reconsideration, Amended Verified Petition of New York Apple at 5-7 (emphasis added).

DOUBLE DECKER'S APPLICATION FOR RECONSIDERATION

Double Decker's opposition to the September 6 entry of Order No. 4658 staying Order No. 4642 is denominated an application for reconsideration. Order No. 4658 is not the final order in this proceeding.[9] Only a final order is subject to reconsideration.[10] Double Decker's opposition is more properly considered an adjunct to its reply to protestant's application for reconsideration inasmuch as protestant's application triggered the entry of Order No. 4658.

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[9] Cf., In re Lancaster Enters., Inc., t/a Dial-Of-Wheels Shuttle, No. MP-90-01, Order No. 3608 (Feb. 6, 1991) (post-revocation order denying motion for extension of time not final order); In re Alexandria, Barcroft & Wash. Transit Co., No. 221, Order No. 1110 (Dec. 11, 1970) (order denying reconsideration not final order).

[10] Compact, tit. II, art. XIII, § 4(a).

Double Decker contends that its due process rights were violated because it should have been permitted an opportunity to respond to protestant's request for stay before the Commission acted on its own motion. Double Decker's argument fails for two reasons. First, it ignores the thirty-one years that filing an application for reconsideration acted as an automatic stay under the original Compact.[11] Automatic stays do not offend the Due Process Clause.[12] When the Compact was amended effective 1991, the automatic stay provision was altered to provide that filing an application for reconsideration does not act as a stay unless otherwise ordered by the Commission.[13] The Commission did not exercise that retained power here. Instead, it weighed the risk of harm to the public against the potential for harm to Double Decker before issuing Order No. 4658. That is more process than Double Decker would have received under an automatic stay.

Second, Double Decker has now received the equivalent of a post-deprivation hearing. Under Dixon v. Love, 431 U.S. 105, 97 S. Ct. 1723 (1977), such a hearing satisfies due process when the need for immediate action to safeguard the public outweighs the harm of suspending the licensee's rights and the risk of erroneous deprivation is not great. 97 S. Ct. at 1727-29. The deprivation to Double Decker was not as substantial as that in Dixon, but the threat of injury to the public was just as real. In Dixon, the right suspended was a license that had already issued. 97 S. Ct. at 1726. When Order No. 4658 was entered, Double Decker had not filed any of the documents required by Order No. 4642, and, thus, Certificate No. 314 had not issued. Further, Certificate No. 314 was and is still subject to rescission or modification upon reconsideration. In Dixon, the threat to the public was evidenced by a record of the licensee's repeated violation of transportation safety laws. 97 S. Ct. at 1726-27. Here, the threat to public safety was evidenced by a record of repeated violations of transportation safety laws by Double Decker's commonly-controlled affiliate. The risk of erroneous deprivation was slight since that record was based in substantial part on the affiliate's own admissions.

That Order No. 4658 passes muster under Dixon disposes of Double Decker's contention that the evidence of record did not support a stay under the four-factor test of WMATC v. Holiday Tours, Inc., 559

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[11] See Black United Front v. WMATC, 436 F.2d 227, 231 (D.C. Cir. 1970) (stay of order automatic, immediate and mandatory upon filing application for reconsideration).

[12] In re Briggs Transp. Co., 780 F.2d 1339 (8th Cir. 1985); Bucks County Cable TV, Inc. v. United States, 427 F.2d 438 (3rd Cir.), cert. denied, 400 U.S. 831 (1970).

[13] Compact, tit. II, art. XIII, § 4(e). Commission Rule No. 27-05 states: "The filing of an application for reconsideration shall not act as a stay upon the execution of the order or the decision of the Commission; provided, however, that upon written consent of the parties, including staff counsel, such order or decision may be stayed to the extent ordered by the Commission." By promulgating this rule, we did not intend to abandon all discretion, but the rule does reflect the Commission's policy that ordinarily a stay will not be granted.

F.2d 841 (D.C. Cir. 1977), when Order No. 4658 was issued.[14] As supplemented by Double Decker's response, however, the record at this time does not warrant an extension of the stay. Double Decker's response establishes that DCA has agreed to allow New York Apple to continue operating pending a resolution of the August 11 charges.[15] DCA's agreement makes it appear less likely that New York Apple's license will be revoked and that the Grants will be found unfit. This in turn makes it appear less likely that protestant will succeed on the merits and necessarily lessens our perception that the public safety would be threatened by permitting the owners and operators of New York Apple to commence operations in the Metropolitan District through Double Decker. In addition, Double Decker has satisfied or nearly satisfied the prerequisites to issuance of Certificate No. 314, increasing the potential for harm to Double Decker if the stay is not lifted. Accordingly, we find the scales now tip in favor of Double Decker.

We will provide for inspection of Double Decker's buses by staff to ensure compliance with Order No. 4642 and Commission Regulation No. 61, notwithstanding Double Decker's assurances that the "busses [sic] imported for Double Decker's use in Washington are entirely different vehicles, and are in no way connected to the New York busses [sic]." The vehicle titles filed by Double Decker in response to Order No. 4642 bear a Ft. Lee, NJ, address, which is directly across the Hudson River from New York City. The proximity of that address to New York Apple's operations compels Commission inspection of Double Decker's vehicles as an exercise in caution. Once New York Apple has complied with Order No. 4642 and six buses which have passed inspection by Virginia have in turn been inspected by staff, Certificate of Authority No. 314 shall issue. Double Decker shall present its remaining buses for inspection by staff within the time specified below.

THEREFORE, IT IS ORDERED:

1. That protestant's application for reconsideration of Order No. 4642 is granted to the extent provided herein.

2. That protestant's Motion for Leave to File Response to Reply of Double Decker and for Public Hearing is rejected.

3. That unless and until otherwise ordered by the Commission, Double Decker shall file with the Commission on the first of each month, an original and four copies of a written report apprising the

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[14] The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the stay is granted; and (4) the public interest in granting the stay. Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing Holiday Tours, 559 F.2d at 843).

[15] Exhibit G to Double Decker's Reply to Protestant's Application for Reconsideration.

Commission of the status of the DCA proceedings. The report shall include copies of all relevant orders, agreements and stipulations.

4. That Double Decker's application for reconsideration of Order No. 4658 is denied.

5. That the stay entered in Order No. 4658 is lifted.

6. That Double Decker shall arrange with staff a date and time for inspection of six buses which have passed inspection by Virginia and shall present them at the appointed hour.

7. That upon compliance with the requirements of the preceding paragraph and Order No. 4642, Certificate of Authority No. 314 shall be issued to Double Decker.

8. That Double Decker may not transport passengers for hire between points in the Metropolitan District unless and until a certificate of authority has been issued in accordance with the preceding paragraph.

9. That Double Decker shall present its remaining buses for inspection by staff within the time specified below.

10. That unless Double Decker complies with the requirements of this order within 30 days from the date of its issuance, or such additional time as the Commission may direct or allow, the grant of authority in Order No. 4642 shall be void and Double Decker's application shall stand denied in its entirety effective upon the expiration of said compliance time.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS ALEXANDER, LIGON, AND SHANNON:

William H. McGilvery
Executive Director